

NO. 80995-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

ROBERT BONDS

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED FOR REVIEW

1. Should this Court find review was improvidently granted when the State did not file its motion for discretionary review within the mandatory 30-day deadline and did not ask this Court to extend the deadline based on extraordinary circumstances?

2. Did the Court of Appeals abuse its discretion when it ruled equitable considerations entitle Mr. Bonds to amend his personal restraint petition when the original petition was timely filed, the additional ground for relief was diligently pursued, serious attorney misconduct and extraordinary violations of statutory and constitutional procedures by the courts caused the delay in adding the issue to the petition, and the prosecution does not contest that the added claim requires reversal of Mr. Bonds' convictions?

B. STATEMENT OF THE CASE

The Court of Appeals granted Robert Bonds' motion to amend his timely filed personal restraint petition (PRP) and add a claim that the trial court improperly closed the courtroom to the public on several occasions during his jury trial for two counts of attempted first degree murder, and his appellate attorney was ineffective for failing to raise this structural and obvious error during his direct appeal.

The prosecution has not contested the violation of Mr. Bonds' right to a public trial and implicitly concedes the error requires reversal. It challenges only the Court of Appeals' authority to allow Mr. Bonds to amend his timely filed PRP to add this issue to his PRP when 14 months had elapsed from the time his direct appeal concluded until he asked permission to amend his petition.

On May 9, 2005, the Court of Appeals issued a mandate ending Robert Bonds' direct appeal and affirming his convictions. Less than six weeks later, Mr. Bonds filed a PRP arguing his appellate counsel rendered ineffective assistance by failing to challenge the admission of testimonial statements by his co-defendants in violation of the Confrontation Clause of the Sixth Amendment. Mr. Bonds also asked the Court of Appeals to appoint counsel to assist him.

The Court of Appeals did not take any action on the petition until May 5, 2006, when it ruled the petition raised a non-frivolous issue that merited review and appointed counsel. This ruling was issued almost ten months after Mr. Bonds filed his PRP and four days shy of one year after the mandate was issued.

On July 26, 2006, Mr. Bonds' newly-appointed attorney filed a brief in support of the PRP, and also filed a motion asking the Court of Appeals for permission to add an additional issue for

consideration. The Commissioner granted this motion; the State filed a motion to modify the Commissioner's ruling; and the Court of Appeals denied the State's motion. The State sought discretionary review in this Court, objecting to the amendment of the personal restraint petition. A Commissioner of this Court found the prosecution's motion did not meet the criteria for discretionary review and advised the prosecution it could object to the amendment through its regular briefing.

On November 14, 2007, the Court of Appeals ruled Mr. Bonds should be permitted to amend his petition and held the trial court improperly closed the courtroom during his trial. The Court of Appeals noted that this was the type of error that is especially difficult for a litigant to be aware of because it rests on the trial court's neglect of its mandatory duty to inform a criminal defendant and the public of the right to object to a courtroom closure.

The Court of Appeals reversed Mr. Bonds' convictions due to the improper courtroom closure in an unpublished decision. The prosecution filed a motion for discretionary review on December 18, 2007, more than 30 days after the Court of Appeals issued its decision. This Court granted the State's petition for review.

C. ARGUMENT

1. THIS COURT SHOULD DENY REVIEW BECAUSE THE STATE DID NOT TIMELY FILE ITS MOTION FOR DISCRETIONARY REVIEW

After the Court of Appeals issues a decision terminating review, a party has 30 days in which to file a motion for discretionary review or petition for review. RAP 13.4(a); RAP 13.5(a). The deadline for filing a motion for review by this Court is not liberally enforced, with the court's focus on the exercise of justice rather than strict adherence to the rules, as other court rules are. RAP 1.2(a), (c); RAP 18.8(b). RAP 18.8(b) provides in part,

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration.

Motions for discretionary review and petitions for review must be received by the appropriate appellate court within the time for filing, not merely mailed within the time for filing. RAP 18.6(c).

The Court of Appeals issued its decision on November 14, 2007. The State filed its motion for discretionary review in the Supreme Court on December 18, 2007. This Court's computer records and a letter from the clerk noting the day the court received the motion document the filing. The State has not explained that

extraordinary circumstances prevented it from filing the petition by the December 14, 2007, due date.¹

The issue here centers on the State's vehement objection to a court granting Mr. Bonds equitable relief for a trial error that it concedes requires reversal of his convictions. At the same time, the prosecution has not deigned to explain why it filed its motion for discretionary review several days late or offered any extraordinary circumstances that kept it from filing a timely petition.

If the prosecution is excused from meeting a mandatory filing deadline for filing a motion for discretionary review without explanation, the court must extend Mr. Bonds the same courtesy. Mr. Bonds has been diligent. He asked for permission to add an issue to his timely-filed PRP and worked hard to complete his briefing as quickly as possible. He should not be denied relief for a structural error requiring reversal while the prosecution pays no penalty for its own unexplained, untimely petition for review.

2. PRINCIPLES OF EQUITABLE TOLLING ALLOW A COURT DISCRETION TO AMEND A PRP BASED ON EXTRAORDINARY CIRCUMSTANCES AND THE PETITIONER'S DILIGENCE

a. Equitable tolling is a well-established doctrine

resting on principles of fairness. Equitable tolling is a doctrine that

¹ In his Answer, Mr. Bonds argued the State's untimely filing should weigh against granting review, but the Court's ruling granting review did not

allows a court, for good cause and in the interest of fairness, to modify the harsh application of a statute of limitations on equitable grounds where the claimant has been reasonably diligent and the respondent has not been unduly prejudiced. Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); Burnett v. New York Central Railroad Co., 380 U.S. 424, 428, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). It is an important “safeguard[] against the potential for injustice that a literal reading” of a statute of limitations might otherwise produce. Duncan v. Walker, 533 U.S. 167, 184, 121 S.Ct. 2120, 150 L.Ed.2d 451 (2001) (Stevens, J., concurring).

“To be entitled to equitable tolling,” a party must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Lawrence v. Florida, __ U.S. __, 127 S.Ct. 1079, 1085, 166 L.Ed.2d 934 (2007) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)). Equitable tolling is a doctrine of fairness and involves a “highly fact-dependent” assessment of numerous considerations. Whalem v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000); Spitsyn v. Moore, 345 F.3d 796, 799-801 (9th Cir. 2003). It should be determined “on a case-by-

address the untimeliness of the State’s motion for discretionary review.

case basis, depending on the equities in each case.” Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981); see Valverde v. Stinson, 224 F.3d 129, 134 (2nd Cir. 2000) (“equitable tolling does not lend itself to bright-line rules.”); see also Holmberg v. Ambrecht, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946) (Justice Frankfurter noting, “Equity eschews mechanical rules; it depends on flexibility.”).

b. Federal courts uniformly consider equitable tolling of their strictly-enforced filing deadlines in habeas cases. Federal courts have a “venerable” history of applying equitable tolling to extend otherwise strictly-enforced deadlines for statutes of limitations, including the filing deadline for a habeas corpus petition. Luntungan v. AG of the United States, 449 F.3d 551, 557 (3rd Cir. 2006) (noting equitable tolling doctrine favorably cited in courts of chancery decisions). Federal precedent is instructive due to the breadth of claimants seeking equitable tolling as opposed to the rare request for such an extension in the context of a PRP.

Federal courts have found equitable tolling of the habeas deadline available when a prison’s law library lacks a copy of the statute explaining the procedures for filing a habeas petition, even though the library contains sufficient resources to write the substantive portion of the petition. Roy v. Lampert, 465 F.3d 964,

970-71 (9th Cir. 2006); Whalem, 233 F.3d at 1148. Courts have applied equitable tolling when prison transfers an inmate, causing lack of access to necessary legal materials for a period of time and he could have reasonably been confused about the deadline for filing his petition. Lott v. Mueller, 304 F.3d 918, 921, 923-24 (9th Cir. 2002).

In Coriasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002), the district court incorrectly rejected a petition because the cover sheet used "white out," and then it lost the body of the petition. Six months later, the court appointed counsel, who located a copy of the missing petition, and the court granted leave for counsel to file an amended petition. Id. at 876. The Coriasso Court found the petitioner was entitled to equitable relief because the court should not have rejected the petition and then as a consequence of this extraordinary circumstance, it took approximately eight months for the court to take further action on the case. Id. at 878-79.

A party may seek equitable tolling based on ineffective assistance of counsel as long as the party exercised "due diligence" in vindicating her rights. Jin Bo Zhao v. INS, 452 F.3d 154, 156-57 (2nd Cir. 2006). It is available when an attorney promises but fails to timely file a petition, even though the petitioner could conceivably have filed the petition on his or her own.

Spitsyn, 345 F.3d at 800. The equitable tolling doctrine rests on when the petitioner discovered or should have known he or she suffered an injury while acting with reasonable diligence. Yuan Gao v. Mukasey, 519 F.3d 376, 2008 U.S. App. LEXIS 5139, *2 (7th Cir. 2008).

Mere attorney error, confusion, or miscalculation of a time limit does not justify equitable tolling. Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (attorney's mistake calculating time limit is negligence, but not basis for equitable tolling). But when an attorney's actions extend beyond everyday mistakes into the realm of serious misconduct, "such malfeasance may be 'far enough outside the range of behavior that reasonably could be expected by a client that [it] may be considered 'extraordinary.'" Downs v. McNeil, __F.3d __, 2008 U.S. App. LEXIS 6090, *18 (11th Cir. 2008).

The party seeking an extension of a statutory deadline needs to have used due diligence, but need not show "superhuman efforts" and need not surmount extraordinary obstacles. Id. at *35. The extraordinary circumstances must be ones that the petitioner "was reasonably unable to control." Id.

In other words, it need not have been "literally impossible" for a petitioner to have acted earlier in presenting a claim. Harris v. Carter, 515 F.3d 1051, 1054 n.5 (9th Cir. 2008). Even if technically

possible for an individual to have filed a habeas petition earlier, courts look to whether it is likely a person would not have been able to do so. Id. For example, a language barrier or lack of access to legal materials may present extraordinary circumstances that could not be surmounted even with due diligence. Id.

Furthermore, federal courts treat as “highly relevant” a petitioner’s pro se status when seeking relief from a filing deadline. Roy, 465 F.3d at 969. Although “pro se status alone is not enough to warrant equitable tolling, it informs and colors the lens through which we view the filings.” Id. at 970.

c. The filing deadline for a PRP is properly subject to equitable tolling and amending a petition is a proper discretionary role for an appellate court. Personal restraint petitions are governed by Title 16 of the Rules of Appellate Procedure and RCW 10.73.090, et seq. RCW 10.73.090 provides, in pertinent part, that personal restraint petitions must be filed within one year of the end of a direct appeal.

Under the doctrine of equitable tolling, a court may extend the time for filing court pleadings when it would be inequitable to hold the party to statutory time limit requirements. State v. Littlefair, 112 Wn.App. 749, 758, 51 P.3d 116 (2002), rev. denied, 149 Wn.2d 1020 (2003). “Equitable tolling is granted by courts

when justice requires.” Finklestein v. Security Properties, 76 Wn.App. 733, 739, 999 P.2d 161 (1991).

The Court of Appeals has tolled the statute of limitations of RCW 10.73.090 based on principles of equitable tolling. Littlefair, 112 Wn.App. at 757-58 (extending RCW 10.73.090 deadline for two years under equitable tolling doctrine); In re Personal Restraint of Hoisington, 99 Wn.App. 423, 430-31, 993 P.2d 296 (2000) (applying equitable tolling to extend deadline in RCW 10.73.090); see also State v. Robinson, 104 Wn.App. 657, 667, 17 P.3d 653, rev. denied, 145 Wn.2d 1002 (2001) (recognizing availability of equitable tolling of RCW 10.73.090 but declining to toll in that case); State v. Duvall, 86 Wn.App. 871, 874-75, 940 P.2d 671 (1997), rev. denied, 134 Wn.2d 1012 (1998) (applying equitable tolling to statutory time limit for imposing restitution in criminal case).

RCW 10.73.090 has been interpreted as a statute of limitations on numerous occasions. See Shumway v. Payne, 136 Wn.2d 383, 397, 964 P.2d 349(1998); In re Personal Restraint of Runyan, 121 Wn.2d 432, 445, 853 P.2d 424 (1993); Littlefair, 112 Wn.App. at 757-58; Hoisington, 99 Wn.App. at 431; Duvall, 86 Wn.App. at 874. As a statute of limitations, “the limit is subject to principles of waiver and estoppel, including the doctrine of

equitable tolling.” Duvall, 86 Wn.App. at 874.

Courts apply the doctrine of equitable tolling when the party seeking tolling acted with reasonable diligence and the court or another party acted or failed to act in accordance with its general obligations. Duvall, 86 Wn.App. at 875. Courts grant equitable relief sparingly, and not as a remedy for “a garden variety claim of excusable neglect.” Id. at 874. An act or omission by the court may justify equitable tolling. Hoisington, 99 Wn.App. at 431-32.

Washington courts frequently refer to equitable tolling as available only when there has been “fraud, deception, or bad faith,” by the opposing party. In re Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003) (citing Duvall, 86 Wn.App. at 875). However, this definition is not exclusive, as equitable tolling has long been defined as requiring that “(1) a party has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Lawrence, 127 S.Ct. at 1085. The proper focus lies on the extraordinariness of the circumstances and the diligence of the petitioner, not on a strict requirement of deceit, ill-intentioned motives, or the literal impossibility of addressing the error earlier. Harris, 515 F.3d at 1054-55.

d. Bowles does not bind this Court or pertain to the issue in the case at bar. In Bowles v. Russell, __ U.S. __, 127 S.Ct.

2360, 2366, 168 L.Ed.2d 96 (2007), the court refused to toll the deadline for filing a notice of appeal even when the petitioner had been affirmatively misled by the trial court as to its due date, on the grounds that the notice of appeal filing deadline is “jurisdictional” and not a statute of limitations. 127 S.Ct. at 2362, 2366.

In Washington, the PRP filing deadline in “RCW 10.73.090 ‘functions as a statute of limitation and not as a jurisdictional bar.’” Littlefair, 112 Wn.App. at 758 (quoting Hoisington, 99 Wn.App. at 431). On the other hand, the time for filing a notice of appeal in a civil case in federal court, “has been treated as jurisdictional in American law for well over a century.” Bowles, 127 S.Ct. at 2364 n.2. When a time limit is labeled “jurisdictional,” it is absolute and courts are “forbidden” from considering whether equitable considerations warrant extending the deadline unless provided for in the rule. John R. Sand & Gravel Co. v. United States, __ U.S. __, 128 S.Ct. 750, 753, 169 L.Ed.2d 591 (2008). Whether a filing deadline is jurisdictional, and thus immune from any equitable considerations, depends on how the deadline has been historically treated. Sand & Gravel, 128 S.Ct. at 754-56.

Bowles did not overturn precedent establishing that statutes of limitation may be equitably tolled. Diaz v. Kelly, 515 F.3d 149, 153 (2nd Cir. 2008). After Bowles, the Supreme Court stated that

most limitations periods are non-jurisdictional affirmative defenses and are subject to equitable tolling. Sand & Gravel, 128 S.Ct. at 753. It is only when a long line of cases have treated a statutorily-created time limit as jurisdictional that it will fall outside the possible embrace of equitable considerations. Id. (finding Court of Federal Claims as jurisdictional only because a long line of prior decisions had so held and court must rely on *stare decisis*); see also Diaz, 515 F.3d at 153-54 (applying equitable tolling principles to habeas petitioners). Accordingly, Bowles simply has no bearing on whether this Court may accept an amendment to a PRP two months after the one-year deadline for filing a personal restraint petition has passed. As noted above, the deadline for filing a personal restraint petition has been historically treated as a statute of limitations that may be equitably tolled.

e. Benn is inapplicable.² The prosecution argued below that Benn precludes a court from granting equitable relief in adding an issue to a PRP. Yet in Benn, the doctrine of equitable tolling was never even broached by the petitioner, and likely for good reason, as Benn did not have equitable grounds for adding claims to his PRP four years after counsel was appointed.

² In re Pers. Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), rev'd sub. nom Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), cert. denied, 537 U.S. 942 (2002)

In Benn, court-appointed counsel reviewed the record and filed a personal restraint petition. 134 Wn.2d at 880. Several years of delay ensued as the Supreme Court reviewed the case, remanded it for an evidentiary hearing on specified issues, and accepted supplemental brief adding issues arising from the reference hearing. Id. at 882, 884.

After the PRP had been pending for four years, Benn asked to raise a new issue relating to the self-defense jury instruction used at trial. Id. The Benn Court rejected this final motion to add the jury instruction issue, finding it both untimely and unmeritorious. Id. at 938-41. The Court noted that Benn had counsel throughout this time period, the instructional issue was one that should have been reasonably available to him earlier, and would not lead to reversal in any event. Id.³ Although not available in the circumstances of Benn, the weight of precedent grants the court authority to consider whether there has been an unfairness that merits equitable relief in extending the one-year limitations period for adding an issue to a PRP.

f. The Court of Appeals properly accepted an amendment to the PRP in the unique circumstances presented in

³ Benn was reversed by the Ninth Circuit Court of Appeals, based on its erroneous application of law relating to the prosecution's failure to disclose pertinent impeachment information. 283 F.3d at 1054.

the case at bar. A constellation of circumstances entitle Mr. Bonds to the equitable remedy of amending his PRP two months after the one-year deadline passed for filing a PRP. See Lott, 304 F.3d at 924 (“confluence” of factors may underlie equitable relief).

First, Mr. Bonds was reasonably unaware of the error when it occurred and throughout the appellate process. The trial court closed the courtroom to the public on multiple occasions without any on-the-record explanation.⁴ Washington unambiguously and strictly mandates that any courtroom closure must be preceded by an on-the-record discussion of the need for the closed proceedings, must offer anyone present the opportunity to object to the closed courtroom, and any restriction on public access must be drawn as narrowly as possible.⁵

Mr. Bonds’ trial attorney did not object to the closed courtroom on any occasion or advise the court of the impropriety of its courtroom closures. Mr. Bonds’ attorney on direct appeal likewise raised no challenge to the numerous, improper courtroom closures. An attorney’s failure to object to a courtroom closure, either at trial or on appeal, constitutes ineffective assistance of

⁴ The numerous courtroom closures are discussed in the Court of Appeals ruling, Slip op. at 17; and in the PRP brief filed by counsel, p. 33-36.

⁵ See In re D.F.F., __ Wn.App. __, 2008 Wash. App. LEXIS 939, *5-12 (2008) (finding MPR 1.3 unconstitutional because it *per se* excludes the public from civil mental health commitment proceedings and discussing “repeated” and

counsel. In re Restraint of Orange, 152 Wn.2d 795, 813, 100 P.3d 291 (2004) ("we agree with Orange that the failure of his appellate counsel to raise the issue [of courtroom closure] on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel."). The Court of Appeals properly concluded that the nature of the error is one which Mr. Bonds would be reasonably unaware, thus establishing serious misconduct of the attorney and court and meriting equitable relief for Mr. Bonds. Slip op. at 14.⁶

Second, the Court of Appeals recognized that it violated its obligation to "promptly" review a PRP and appoint counsel when the PRP a non-frivolous issue. Slip op. at 14-15; RAP 16.11. RCW 10.73.150(4) directs the Court to appoint counsel for a PRP under the procedures set forth in RAP 16.11, including the requirement that the Court act promptly.⁷ But the Court of Appeals

"uniform" cases requiring individualized decisions before limiting public access to trial).

⁶ "Our Supreme Court has recognized the difficulty of identifying the nature of a violation of the public trial right when the trial court has not informed potential objectors of the asserted interests." Slip op. at 14.

⁷ RCW 10.73.150(4) provides in pertinent part:

Counsel shall be provided at state expense to an adult offender convicted of a crime [and]

(4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11. (emphasis added).

RAP 16.11(a) says in part, "The Chief Judge will consider the petition promptly . . ." RAP 16.11(b) also permits the Chief Judge to "enter other orders necessary to obtain a prompt determination of the petition on the merits."

did not review the petition and appoint counsel until nearly 10 months had passed from its filing. The delay was in part due to the State's own tardy filing of a response brief, and then mailing its response to Mr. Bonds' incorrect address despite having notice of Mr. Bonds' prison location, but the State's role in contributing to the delay of the court's review of the PRP and appointing counsel was not attributable to or controllable by Mr. Bonds. The Court of Appeals determined "the fault for delay lies with the court," and equitable considerations merit granting relief. Slip op. at 14-15.

Third, Mr. Bonds acted with reasonable and admirable diligence in promptly filing his PRP and a request for counsel. He complied with the myriad of procedural rules attendant to a personal restraint petition even though he was *pro se* and incarcerated. His court-appointed attorney read over 4,000 pages of transcripts from a seven-week long trial and filed a brief within two months of receiving the case. Filing an amended petition upon appointment of counsel would have been impossible when only four days remained before the one-year deadline of RCW 10.73.090 expired. The Court of Appeals reasonably concluded that Mr. Bonds diligently pursued his rights.

Since Mr. Bonds had full authority to amend his petition

within one year, the Court of Appeals' failure to appoint counsel promptly made it impossible for Mr. Bonds to add otherwise available issues within the one-year statutory deadline. See e.g., State v. Bisson, 156 Wn.2d 507, 515, 526, 130 P.3d 820 (2006) (accepting newly appointed counsel's amended personal restraint petition adding wholly unrelated issue within statutory time limit); RAP 16.10(c) ("The appellate court may call for additional briefs at any stage of the consideration of the petition.").

The policy underlining the PRP statute likewise favors equitable relief. The purpose of permitting a collateral appeal from a criminal conviction is to correct an unlawful conviction. The purpose of the statutory limitations are to ensure a party does not "sleep on his rights" until the point that memories have faded and the State has been lulled into a false sense of finality. But amending the PRP in the case at bar is consistent with both purposes. Mr. Bonds raises a ground for relief that uncontestedly requires reversal of his convictions, and it would be fundamentally unfair to deny him relief. Mr. Bonds did not sleep on his rights. He filed his PRP within two months of the mandate, so the State was not under the impression that the convictions would remain final.

Extraordinary delay occurred in reviewing the petition and appointing counsel, and the additional ground for relief rests on the

deprivation of competent counsel and the trial court's extraordinary departure from well-established strictures governing open court proceedings. Mr. Bonds acted with diligence and respect for deadlines throughout the proceedings. He did not file his documents at the last possible date, which may have altered the considerations of equity in granting his amended petition.⁸

Extending the deadline for amending the petition by two and one-half months is a reasonable exercise of discretion by the Court of Appeals under its authority to toll the statute of limitations based on considerations of equity unique to this case.

g. The court has discretion to permit the amendment of a PRP as sound policy. The prosecution argued below that Mr. Bonds was grossly abusing his limited right to counsel by getting a second court-appointed attorney to review the trial court proceedings and raise additional issues.

RAP 16.10 permits the court to allow additional briefing at any time. The court rules are interpreted liberally. RAP 1.2(a), (c). There is no inherent unfairness to the prosecution when the

⁸ For example, in Robinson, the petitioner mailed a PRP on the day before the one-year deadline expired and the clerk did not stamp the PRP as received until three days past the deadline. 104 Wn.App. at 661. The court concluded that Robinson should have anticipated the post office could be tardy in delivering mail and should have posted the petition earlier to ensure timely filing. Id. at 668-69. By filing his PRP with 10 months remaining on the one-year clock, Mr. Bonds took reasonable steps to ensure his rights would be timely addressed and remedied.

petitioner timely files a collateral attack and asks to raise an additional ground for relief. In such a case, the prosecution is already aware the conviction is being challenged and thus has no expectation that the ruling's finality will be undisturbed. Also, the prosecution has full opportunity to respond to the added issue. While the court need not grant all requests for amending a personal restraint petition, and must do so within the constraints of the RCW 10.73.100 and equitable relief limitations, it may exercise its discretion in accepting an additional ground for relief.

The prosecution also contends that an indigent person is only entitled to an attorney for one, direct, appeal and therefore should not be allowed to raise an additional issue identified by counsel. This argument is misguided and illegitimate.

A petitioner may not be denied the right to amend a petition when such relief would be available to a person who could afford to hire an attorney. See Draper v. Washington, 372 U.S. 487, 496, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963). If a person with retained counsel may ask the court's permission to add an issue to a timely filed PRP, an indigent person must be similarly treated.

Second, the prosecution cannot dictate or control the issues a petitioner presents. It is the court's role to screen issues and to decide whether it is appropriate to grant a request to amend a

PRP. The prosecution may not limit the substance of an attorney's review of a case and deny the attorney even the opportunity to ask the court's permission to add an issue to a collateral appeal.

Third, the prosecution may not interfere with an attorney's obligation to pursue relief. When a properly-appointed attorney discovers an issue on which reversal would be required, the State argues that counsel must ignore the plain legal error. Of course, rules barring successive PRPs would mean the petitioner would never be able to raise the claim. Amendments of PRPs are certainly not available at any time and in any case, but when the petitioner has acted diligently and could have raised the issue timely but for circumstances the petitioner could not control, it is entirely appropriate to permit a petitioner to add the issue. And it is wholly improper to deny relief of an obvious error on the grounds that the prosecution expects the petitioner's attorney to wear blinders rather than ask permission to include an additional issue in the PRP. The Court of Appeals decision is consistent with precedent, is a reasonable assessment of the equities in the case, and should be affirmed by this Court.

F. CONCLUSION

For the reasons stated above, this Court should deny the State's motion for discretionary review and affirm the decision of the Court of Appeals.

Dated this 2nd day of May 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy Collins", is written over a horizontal line.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE THE PERSONAL RESTRAINT PETITION OF)

ROBERT BONDS,)

Petitioner.)

NO. 33704-5-II

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 2ND DAY OF MAY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHELLE LUNA-GREEN
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE S, RM 946
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() HAND DELIVERY
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[X] ROBERT BONDS
WA 967315
NORTH FORK CORRECTIONAL FACILITY
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SAYRE, OK 73662

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() HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MAY, 2008.

X _____

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